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No. 92-1292

In The

Supreme Court of the United States

October Term, 1992

LUTHER R. CAMPBELL a/k/a LUKE SKYYWALKER, CHRISTOPHER WONGWON a/k/a FRESH KID ICE, MARK ROSS a/k/a BROTHER MARQUIS, DAVID HOBBS a/k/a MR. MIXX; professionally known as THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Sixth Circuit properly applied this Court's decisions in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) and in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) in deciding this case?

II. Whether the application of Rule 301 of the Federal Rules of Evidence is properly before this Court or is relevant to this case?

III. Whether the commercial purpose of a derivative work weighs against a finding that the use of the underlying copyrighted work is fair?

IV. Whether consideration of the effect on the potential market for or value of a copyrighted work is a proper consideration for determining whether a particular use of a copyrighted work is fair?

RULE 28.1 LISTING

Acuff-Rose Music, Inc. is a Tennessee corporation. It is a wholly owned subsidiary of Opryland Music Group, Inc. Opryland Music Group is a subsidiary of Opryland USA, Inc., which is a subsidiary of Gaylord Broadcasting Co., which is a subsidiary of TGF Company, which is a subsidiary of Gaylord Entertainment Company, a publicly held corporation. Acuff-Rose Music Incorporated's affiliated corporations are Milene Music, Inc. and Springhouse Music, Inc.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

Respondent Acuff-Rose Music, Inc. ("Acuff-Rose") does not disagree with the statement of jurisdiction contained in the Petition for Writ of Certiorari ("Petition") at 2,[1] except that Acuff-Rose contends that the Petition does not meet the requirements set

1. The Petition for Writ of Certiorari shall be cited as "Petition at __."

forth in Rule 10.1(a) of the Rules of the Supreme Court for this Court to grant certiorari.

STATEMENT OF THE CASE

A. Background

This lawsuit involves the Petitioners' unauthorized use of Acuff-Rose's song "Oh, Pretty Woman." App. 2a-3a. "Oh, Pretty Woman" was written by Roy Orbison and William Dees in 1964 and assigned to Acuff-Rose that year. App. 2a. The copyright was properly registered. *Id.* Acuff-Rose has received substantial income on "Oh, Pretty Woman" from the use of Roy Orbison's recording, from numerous additional recordings, and from licensing of derivative works, such as television commercials and movies. *See* App. 2a: Declaration of Gerald Teifer at ¶ 10. Petitioners, Luther R. Campbell a/k/a Luke Skyywalker, Christopher Wongwon a/k/a Fresh Kid Ice, Mark Ross a/k/a Brother Marquis, David Hobbs a/k/a Mr. Mixx, professionally known as The 2 Live Crew, and Luke Skyywalker Records ("the Petitioners"), copied portions of Respondent's song and incorporated, apparently through sampling, other portions of Respondent's song into their work "Pretty Woman." R. 7: Affidavit of Luther Campbell at pp. 1-2; R. 4: Affidavit of Oscar Brand at pp. 3-4; R. 8: Affidavit of William Krasilovsky at pp. 2; R. 14: Declaration of Earl Speilman at pp. 2-4.

B. Use Of The Copyrighted Work

Contrary to the impression left by the Petition, the chronology of Petitioner's use of the copyrighted work is disputed and is not well developed in the record. App. 3a, n.2. What is clear, however, is that in May 1989, Petitioner Luther Campbell claims to have written "Pretty Woman," a work derived from Acuff-Rose's "Oh, Pretty Woman." App. 2a-3a: R. 7: Affidavit of Luther Campbell Part I ¶ 2. No later than June, 1989, Petitioners released an album

entitled *As Clean As They Wanna Be* containing the derivative work, their version of "Oh, Pretty Woman." *See* R. 7: Affidavit of Luther Campbell, Part II ¶ 4. The trial court incorrectly found that the album was released on July 15, 1989. App. 3a, n.3: R. 25. In Acuff-Rose's Memorandum in Support of Motion to Compel, pending when summary judgment was granted, Acuff-Rose pointed out evidence that sale of *As Clean As They Wanna Be* had actually commenced before either date. App. 3a-4a: R. 21: Memorandum in Support of Motion to Compel, Exhibit A. In fact, the limited records produced to Acuff-Rose by Petitioners showed significant album sales before the end of June, 1989.

C. Licensing Request

The Petition also gives an incomplete picture of the licensing request made by Petitioners. On July 5, 1989, after Petitioners admit sale to the public commenced, Petitioners requested a license to "do a parody."[2] App. 3a: R. 7. Affidavit of Luther Campbell Part II ¶ 1 (stating that permission was sought to write and perform a parody). In their request, Petitioners misled Acuff-Rose about the prior public release by indicating that the use would be made in the future. App. 3a-4a. They did not disclose that the parody[3] was already written and recorded and that the album was

---

2. In the license request, Petitioners stated that they intended to do a parody in the style of Weird Al Yankovic. R. 7: Affidavit of Luther Campbell Exhibit A. Yankovic, recognizing that the extent of his copying in creating a parody does not allow him to qualify for a fair use privilege, secures a license from the copyright owner before creating a parody of the copyrighted work. Sanders & Gordon, *Stranger in Parodies: Weird Al and the Law of Musical Satire*, 1 Fordham Ent., Media & Intell. Prop. L. F. 11, 35-36 (1990).

3. Acuff-Rose has used the term parody for the sake of conforming its Opposition more closely to the Petition. This decision is for convenience of the reader only and should not be read as meaning that Acuff-Rose concedes the Petitioners' derivative work was a legal parody. *See* App. 10a, n. 8 (district court's parody analysis does not comport with proper analysis of that term); Acuff-Rose's brief to the Sixth Circuit at 17-20.

already on sale. *See id.* On July 17, 1989, Acuff-Rose denied a license to use its copyrighted work as the basis of a derivative work. App. 4a. Even though Acuff-Rose refused a license, Petitioners continued with the sale of the derivative work. *Id.* The album, both before and after a license was denied, carried a label that stated the derivative work was actually Acuff-Rose's copyrighted work. *See* CD Cover filed with this Court by Petitioners as Exhibit B.

D. Material Facts In Dispute

Petitioners contend that the affidavits submitted by Acuff-Rose in response to the Motion to Dismiss did not place any facts in dispute. Petition at 5. This is not the case. The derivative work and Acuff-Rose's "Oh, Pretty Woman" were extensively compared in affidavits by experts for the parties. App. 5a: R. 4: Affidavit of Oscar Brand; R. 8: Affidavit of William Krasilovsky; R. 14: Declaration of Earl Speilman. In addition, tapes of the two works were submitted to the trial court. R. 1: Complaint, Exhibits D and E. Facts were in dispute.

One of Petitioners' experts, an attorney, expressed the opinion that Petitioners' "Pretty Woman" evokes "Oh, Pretty Woman" but that "the line between infringement and fair use was not exceeded." R. 8: Affidavit of William Krasilovsky at ¶ 3d. Petitioners also tendered the affidavit of an expert who writes parodies. He conceded the extensive copying that Acuff-Rose's expert discussed. However, he concluded that, because the Petitioners created a parody as the affiant frequently did, as a matter of public policy they should be "encouraged and protected." App. 5a: R. 4: Affidavit of Oscar Brand ¶ 20.

Acuff-Rose submitted the affidavit of Earl V. Speilman, a musicologist. Speilman concluded that the two works were substantially similar, that parts of the copyrighted work probably

had been sampled, and that even the musically unsophisticated would immediately conclude that "Pretty Woman" was modeled after "Oh, Pretty Woman." R. 14: Declaration of Earl Speilman ¶¶ 5, 8. Speilman stated that the "significant amount of similarity" between the copyrighted work and the derivative work included:

> a. the one measure guitar lick, which is repeated over and over again in the intro and subsequent transition sections (and which may have actually been sampled or lifted and then incorporated into the recording of "Pretty Woman" [the derivative work] as performed by The 2 Live Crew);
>
> b. the duplication of the opening line of text of "Oh, Pretty Woman" [the copyrighted work] and the use of the words of the title an additional six times in the course of the remainder of "Pretty Woman";
>
> c. the melodic line of the verse sections of the respective songs;
>
> d. the melodic line of the bridge sections of the respective songs;
>
> e. aspects of the formal structures; the opening measure of percussion; the lyrical structures of the respective texts; and the fact that both works are performed in the same key and at approximately the same tempo.

App. 5a: R. 14: Declaration of Earl Speilman ¶ 7. He also stated that "if someone were to just listen to the two works at issue, no matter what the extent of their musical sophistication, one would immediately recognize that "Pretty Woman" [the derivative work]

was modeled after "Oh, Pretty Woman" [the copyrighted work]." R. 14: Declaration of Earl Speilman ¶ 8.

In addition to the conflicts over the substantiality of the taking, the evidence was also in conflict about the effect on the market for Acuff-Rose's work, although the district court found that Acuff-Rose had not produced "convincing evidence" to disprove Petitioners' defense of fair use. R. 25: Memorandum Opinion at 14. Acuff-Rose submitted the affidavit of its Director of Licensing, Gerald E. Teifer, who stated:

> If The 2 Live Crew's derivative work should become widespread, it would further impair the value of the copyrighted work, and future opportunities for licensing it.

R. 15: Declaration of Gerald Teifer at ¶ 12. Teifer also stated that Acuff-Rose's income from the copyrighted work and the market for the copyrighted work extended beyond the market for Roy Orbison's recording of it. *Id.* at ¶¶ 10 and 11. Such potential markets as movies, other productions, advertising, and marketing campaigns were listed by Teifer as examples of Acuff-Rose's income sources from the copyrighted work. R. 15: Declaration of Gerald Teifer at ¶ 10.

In contrast, Petitioners submitted only the conclusory opinions of its two experts about intended audiences. These affidavits concluded that the intended audience for one of the uses Acuff-Rose has made of its copyrighted work, Roy Orbison's recording, and the intended audience for one of Petitioner's uses of the derivative work, a recording on *As Clean As They Wanna Be,* were not the same audiences. R. 4: Affidavit of Oscar Brand ¶¶ 18-19; R. 8: Affidavit of William Krasilovsky ¶ 3c. Krasilovsky stated that "the record collector seeking the original composition would be highly unlikely to purchase or tune into the 2 Live Crew

version." R. 8: Affidavit of William Krasilovsky at ¶ 3c. *See* discussion at Part IV, *infra.* The contents listed on the label of the *As Clean As They Wanna Be* album represent to the public that the album contains the copyrighted work, as written by Roy Orbison and William Dees. R. 7: Affidavit of Luther Campbell, Exhibit C.

E. Discovery

The Petition ignores the discovery requests that were outstanding at the time the dispositive motion was decided by the district court. Acuff-Rose served discovery requests in this case along with the complaint. Petitioners failed to respond timely and properly to Acuff-Rose's discovery, and Acuff-Rose filed a motion to compel during the pendency of the dispositive motion. R. 20: Motion to Compel. The motion to compel was never decided because, on January 14, 1991, the district court granted partial summary judgment to the Petitioners. R. 25 : Memorandum of the Court.

F. Interpleader

Throughout this litigation, Petitioners have sought to demonstrate (presumably) their good faith based on their offer to pay statutory mechanical royalties and the fact that they interpleaded funds into the district court. The statement of the case in the Petition gives less than a complete explication of this point. Petitioners moved to deposit with the district court the money Petitioners said they owed to Acuff-Rose: an amount of money calculated based on the statutory mechanical rate under the Copyright Act. App. 4a, n. 3: R. 6: Motion to Deposit Funds. The court accepted the interpleader. R. 11: Order. Significantly, Petitioners made no effort to calculate or pay any amounts due or any amounts owed until after this lawsuit was commenced. R. 7: Affidavit of Luther Campbell ¶ 5.

When the district court issued its memorandum opinion finding that the Petitioners' unlicensed use of "Oh, Pretty Woman"

was a fair use, it reserved the question of the "adequacy" of the compensation interpleaded by Petitioners. The district court requested briefing on entitlement to the interpleaded funds and on additional market effects after issuing its Memorandum Opinion. R. 43: Order. With that brief, Acuff-Rose submitted an affidavit detailing actual, unlicensed, and commercial uses that had been made of "Oh, Pretty Woman" following the determination that the substantial copying by Petitioners was proper. R. 45: Declaration of Jerry Flowers.[4] Despite this additional evidence of the adverse market effects suffered by Acuff-Rose, the district court confirmed its finding of fair use. R. 47: Order.

The district court returned the interpleaded mechanical royalties to the Petitioners. *Id.*

SUMMARY OF ARGUMENT

Rule 10.1 of the Rules of the Supreme Court delineate the special and important circumstances in which this Court will grant a petition for certiorari. Petitioners' argument presents none of these circumstances. Petitioners claim that certain cases decided by this Court have overruled cases decided by the courts of appeal.

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4. Among the uses Flowers noted were, on April 4, 1991, a radio station aired a song "Is That A Woman" that was based on "Oh, Pretty Woman." R. 45: Declaration of Jerry Flowers at ¶ 24. "Is That A Woman" used the entire melody, the opening guitar refrain, and the overall structure of "Oh, Pretty Woman" unaltered, and merely changed the lyrics. *Id.* In addition, a Nashville club used "Oh, Pretty Woman," with altered lyrics, as its advertising theme song. *Id.* at ¶ 26. Another rap group, Brother Makes 3, prepared a recording incorporating large segments of the copyrighted work. *Id.* at ¶¶ 27-31. Before the court's approval of the Petitioners' use, no such unauthorized uses had been reported. *Id.* at ¶¶ 23, 32. Each of these types of use had in the past been the source of potential licensing income to Acuff-Rose. *Id.* at ¶¶ 9-22; *see* R. 15: Declaration of Gerald Teifer ¶ 10.

Even assuming for purposes of argument that this supposition is correct, any inconsistency between the decisions of the courts of appeal and later decisions of this Court is not a reason for this Court to grant certiorari.

Petitioners claim that the Court of Appeals for the Sixth Circuit wrongly decided this case, but they do not claim that the lower court's decision "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision." Further, the Sixth Circuit did not decide an important question of federal law that has never been addressed by this Court. Petitioners are essentially dissatisfied that the judgment of the court below was unfavorable to them.

Finally, although not framed as one of the issues, Petitioners do claim a conflict between the circuit courts of appeal. As demonstrated herein, no such conflict exists.

REASONS FOR DENYING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY APPLIED THIS COURT'S DECISIONS IN *SONY CORP. OF AMERICA V. UNIVERSAL CITY STUDIOS, INC.*, 464 U.S. 417 (1984) AND IN *HARPER & ROW PUBLISHERS, INC. V. NATION ENTERPRISES*, 471 U.S. 539 (1985) IN DECIDING THIS CASE.

A. Sixth Circuit's Application of Precedent

Petitioners argue that the court below did not properly apply this Court's decisions in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) and in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). Petitioners are wrong. The Court of Appeals for the Sixth Circuit quoted from and properly applied the analysis from those cases. The fact that Petitioners are not pleased with the result of that analysis is not equivalent to a misapplication of those opinions.

The Sixth Circuit held:

> The use of a copyrighted work primarily for commercial purposes has been held by the Supreme Court to be presumptively unfair. *Sony Corp.*, 464 U.S. 417, 449 (1984). . . . "While commercial motivation and fair use can exist side by side, the court may consider whether the alleged infringing use was primarily for public benefit or for private commercial gain." *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981). The Supreme Court explained that "[t]he crux of the profit/

> nonprofit distinction is not whether the sole motive of the use is monetary gain, but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."

Harper & Row, 471 U.S. at 562. App.12a.

Petitioners do not explain how the Sixth Circuit misapplied this doctrine. In fact, both the trial court and the Sixth Circuit found that Petitioners' primary goal in releasing the record was to sell its music. App. 12a; 754 F. Supp. at 1154. Contrary to the implication in the Petition, the Sixth Circuit specifically stated that the commercial purpose itself was *not* controlling on the issue of fair use. App. 12a. The Sixth Circuit properly applied the presumption that a commercial use is unfair and looked for rebuttal of that presumption:

> Therefore, in analyzing the purpose and character of 2 Live Crew's use of the copyrighted song, the facts in the record require that we start from the position that the use is unfair. We are asked to then consider whether 2 Live Crew met its burden to rebut the presumption. . . .

App. 13a.

Petitioners may not like the Sixth Circuit's judgment, but it is undisputed that the purpose and character of Petitioners' derivative work were commercial. App. 12a: R. 25: Memorandum Opinion at 6. A commercial use "is presumptively . . . unfair" and "tends to weigh against a finding of fair use." *Sony Corp.*, 464 U.S. at 451; *Harper & Row*, 471 U.S. at 562. In addition, the finding of a commercial use raises a presumption that the fourth factor, effect

on the potential market, will also weigh against fair use. *Sony*, 464 U.S. at 451. Here, Petitioners could not rebut the presumption.

Many commentators have suggested an economic model for a fair use privilege. *See Harper & Row*, 471 U.S. 539, 566 n. 9 (1985) (collecting articles and noting that economic analysis led to correct result). If the use is one by which a profit can be made, then the copyright owner should keep that profit. A decision by a rational copyright owner not to seek a profit is driven by the conclusion that greater reward is possible by forgoing the use. *See Goldstein v. California*, 412 U.S. 546, 549 (1973) (part of the reward is control over use).

In addition, this Court has noted with approval the economic theory that a fair use privilege should not be applied if there is a functioning market for the use. *Harper & Row*, 471 U.S. at 566. *See* Sanders and Gordon, *Stranger in Parodies: Weird Al and the Law of Musical Satire*, 1 Fordham Ent., Media & Intell. Prop. L. F. 11 (1990) (there is a functioning market for parody uses).

At one point, Petitioners assert that the instant case is distinguishable from *Harper & Row* and *Sony* because neither of those cases involved "creative derivative works" and this Court should therefore grant review. This argument is not persuasive on the issue of whether certiorari should be granted for two reasons. First, whether this case is *factually* distinguishable from *Harper & Row* and *Sony* is not an issue meriting this Court's review where the legal issues are the same. Moreover, the infringing work in *Harper & Row*, a magazine article based on a book, was a derivative work as that term is used in the Copyright Act. *See* 17 U.S.C. § 101.

Petitioners simply do not explain how the Sixth Circuit "misapplied" this Court's precedent, other than a bare assertion that the lower court "misapplied" and "strengthened" the presumption that commercial uses are unfair. Petition at 9.

Petitioners do not and, indeed, cannot argue that their work was not for commercial purposes. Moreover, they do not and cannot argue that the Sixth Circuit converted the presumption into an "irrebuttable" one. Instead, Petitioners assert that the opinion below "implies if it does not directly state that prior Second and Ninth Circuit precedent has been overruled" by the decisions in *Sony* and *Harper & Row*. As demonstrated below, there is no conflict between the circuit courts of appeal regarding the application of the presumption.

Second, assuming *arguendo*, that there are significant factual distinctions between *Sony* and *Harper & Row* and the instant case, those distinctions are without a legal difference.[5] This Court's holdings regarding the proper interpretation of the four fair use factors contained in 17 U.S.C. § 107 are clear, and this Court should not be expected or required to reaffirm those holdings for every different possible, different, factual scenario or category of fair use. Petitioners would turn this Court into a court of original jurisdiction, forcing it to consider the application of settled law to various factual scenarios. The Petition should be denied.

B. Conflict Between The Circuits

Petitioners assert that the Sixth Circuit is at odds with the courts of appeal for the Second and Ninth Circuits because the Sixth Circuit's opinion in this case "effectively holds that commercial musical parody of a copyrighted work is a misappropriation of the copyrighted work." Petition at 8. To the contrary, the Sixth Circuit explicitly held that "[c]ommercial purpose is not itself controlling on the issue of fair use. . . ." App. 12a. Petitioners have misstated the holding below.

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5. Indeed, Petitioners cited *Harper & Row* as authority to the Sixth Circuit in their brief. Appellees' Brief to Sixth Circuit at 16 and 39.

Furthermore, without quotation or citation of the opinion, Petitioners contend that the decision below "outlaws" musical parody. Petition at 9. Moreover, the Petition implies that all "parodies" have always been considered fair uses, especially in the Second and Ninth Circuits. That is manifestly not the case. *See, e.g., New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp. 1517, 1530 (S.D.N.Y. 1988); *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992). The Sixth Circuit acknowledged the place of parody in entertainment but correctly refused to indulge the Petitioners' suggested rewriting of § 107. "Much of entertainment involves parodies in the popular sense, but section 107 does not direct the courts to conclude that all such parodies are fair uses." App. 10a.

Petitioners also argue that the decision of the Sixth Circuit is inconsistent with specific decisions of the Second and Ninth Circuit Courts of Appeal, *citing, Berlin v. EC Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964); *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); and *Elsmere Music Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980). Petition at 8. This is not the case and to the extent that Petitioners imply that "musical parody" is entitled to or somehow receives special treatment from those circuits, the Petition is incorrect.[6]

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6. *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) expanded the amount of permissible copying when a privilege is sought for unlicensed parody from the "recall or conjure up" test to a "necessary to accomplish reasonably its parodic purpose" test. 794 F.2d 432, 439. *Fisher* based its analysis of substantiality on a footnote in the Second Circuit's opinion in *Elsmere Music. Id.* (*citing Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 n. 1 (2d Cir. 1980)). The footnote was pure dicta, hypothesizing that the "recall or conjure up" test established in *Berlin v. EC Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964), could be too restrictive in some cases.

The Second Circuit repudiated its *Elsmere* speculation in *Warner Bros. Inc.*
(Cont'd)

Petitioners contend that *Sony* and *Harper & Row* "overrule" certain cases from the Second and Ninth Circuits. However, *Fisher* was decided the year after *Harper & Row* and two years after *Sony*. It goes without saying that cases decided first cannot overrule later decisions. Furthermore, if the courts of appeal for those circuits believed that their decisions had been overruled, surely there would have been some discussion of that in the cases decided since *Sony* and *Harper & Row*, especially where *Sony* is cited. To the contrary, in *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992), the court made practically the identical analysis that the Sixth Circuit made, without mentioning that *Sony* and *Harper & Row* "overruled" its past cases. *See also, Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527, 529 (9th Cir. 1984) (since use was of commercial nature, harm to [plaintiff] could be presumed, *citing Sony*).

(Cont'd)
v. American Broadcasting, Inc., 654 F.2d 204 (2d Cir. 1981). In that case, the Second Circuit directed the district court to allow a narrower scope of similarity in a parody case than the district court had posited. On preliminary injunction hearing, the district court found no substantial similarity between Superman and the Greatest American Hero. *Warner Bros, Inc. v. American Broadcasting, Inc.*, 523 F. Supp. 611 (S.D.N.Y. 1981). However, the district court went on to note that even if the similarity was later proved to be substantial rather than isolated, a parody defense might still be available.

The Second Circuit affirmed the denial of a preliminary injunction based on a lack of likelihood of success on the merits but "believe[d] it prudent to note our reservations in connection with . . . [the] discussion of the parody defense." 654 F.2d at 211. The Second Circuit found that a privilege "might be applicable" to a case involving *isolated* direct copying but expressed doubt about the propriety of the privilege *when an entire work was permeated with copying and the same media* were involved. 654 F.2d at 211.

The further implication that the law regarding fair use has a smooth and uninterrupted legal history is obviously far from correct.

Finally, at its most basic, Petitioners' argument is that because some other cases involving musical parody have been determined to be fair uses, the Petitioners' use in this case should be excused under § 107. It is simply does not follow that all musical parodies are fair uses, or that any decision from another circuit finding a musical parody to be an unfair use is "in conflict" as that term is used in Rule 10.1(a). "Nor will differences between two circuits likely be accepted as a sufficient conflict 'if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved.' " 12 J. Moore, *Moore's Federal Practice* ¶ 810.21 (2d ed. 1981) quoting Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 551 (1958). Petitioners are confusing legal standards with the application of the law to the facts of a particular case.

The opinion below reaffirmed the exclusive rights granted to a copyright owner under § 106 of the Copyright Act. The opinion does not "outlaw" musical parody and is not at odds with decisions from either the Second or Ninth Circuits. In fact, the Sixth Circuit cites decisions from both of those circuits as support for its opinion — including *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Elsmere Music v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980); *Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987); *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992). The opinion below properly applied the presumption enunciated by this Court in *Sony* and reaffirmed in *Harper & Row*. The fact that the presumption worked against Petitioners is not a basis for this Court to review the case.

II.

THE APPLICATION OF RULE 301 OF THE FEDERAL RULES OF EVIDENCE IS NEITHER PROPERLY BEFORE THIS COURT NOR RELEVANT TO THIS CASE.

Petitioners argue that the Sixth Circuit has ignored or repudiated Rule 301 of the Federal Rules of Evidence. This argument fails to merit a grant of certiorari on both procedural and substantive grounds. Initially, this argument is not properly before this Court. Rule 301 of the Federal Rules of Evidence was never before mentioned in this action, either to the trial court or to the court of appeals. Ordinarily, the Supreme Court does not decide questions not raised or resolved in the lower court. *Youakim v. Miller*, 425 U.S. 231, 233-34 (1976).

Further, substantively this issue does not merit Supreme Court review under the dictates of Rule 10.1 of the Rules of the Supreme Court. Petitioners' second argument is indistinguishable from their first — Petitioners disagree with the effect of the Sixth Circuit's application of the presumption that commercial use is unfair. Petitioners claim that the Sixth Circuit has [implicitly] rejected Rule 301 of the Federal Rules of Evidence, and has thereby created an irrebuttable presumption in cases such as this. Even a cursory reading of the opinion shows that this is not the case. The Sixth Circuit cited the presumption from *Sony* and applied it in this case. App. 12a-13a. Far from creating an irrebuttable presumption of unfair use, the court specifically acknowledged that the presumption could be overcome and suggested the means for the presumption to be overcome.

> Therefore, in analyzing the purpose and character of 2 Live Crew's use of the copyrighted song, the facts in the record require that we start from the position that the

> use is unfair. We are asked to then consider whether 2 Live Crew met its burden to rebut the presumption by a defense, we note, requiring the court to be convinced that the "parody does not unfairly diminish the economic value of the original."

App. 13a *citing Fisher v. Dees,* 794 F.2d 432, 437 (9th Cir. 1986).

Obviously, the court below has not created an irrebuttable presumption in conflict with the Rules of Evidence. This argument does not justify review by this Court.

III.

THE COMMERCIAL PURPOSE OF A DERIVATIVE WORK WEIGHS AGAINST A FINDING THAT THE USE OF THE UNDERLYING COPYRIGHTED WORK IS FAIR.

Petitioners recast the presumption argument a third time, this time in the form of a suggestion that a new factor be considered in fair use determinations. Petition at 16-20. Petitioners urge this Court to provide parody special consideration over and above the statutory fair use considerations. Acuff-Rose does not dispute that Congress has authorized, and occasionally courts have considered, factors other than the four mandated for consideration by 17 U.S.C. § 107. *See Harper & Row* at 560.

However, the new consideration suggested by Petitioners is one neither worthy of nor properly presented for this Court's attention. Once again, this issue was not presented to the Sixth Circuit or to the trial court. Ordinarily, the Supreme Court does not decide questions not raised or resolved in the lower court. *Youakim v. Miller,* 425 U.S. 231, 233-34 (1976).

Additionally, this Court should reject this invitation to legislate judicially a new category of protection under 17 U.S.C. § 107.[7] Petitioners argue that their work is protected parody and put their work on a par with other examples of parody in American and British literary and musical history, apparently under the mistaken impression that none of these other works would be permissible under the Sixth Circuit's analysis. The Sixth Circuit decision does not support such a tortured reading. The Sixth Circuit merely applied the presumption and held that the Petitioners had not overcome it under the facts of this case.

Apparently, Petitioners would rewrite the statute so that the initial presumption that a commercial derivative work is unfair can be overcome by a simple assertion that the derivative work is "a parody." Proper parody in the legal sense[8] is already the beneficiary of extra protection under the Copyright Act. Congress provided that protection in the fair use section — 17 U.S.C. § 107. Petitioners do not explain why parody, as a distinct category, is deserving of even more protection. Significantly, Petitioners do not point to any other class of work that receives any "heightened" protection under § 107. Congress has provided significant and sufficient protection for parody in that section of the Copyright Act. That Petitioners produced a work that goes beyond the parameters of this protection does not mean this Court should review this case.

The issue of the application of the fair use factors is not an "important question of federal law which has not been, but should be, settled by this Court." On two recent occasions, in *Sony* and

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7. Parody, as such, is not one of the specific examples of fair use listed in § 107. It has arisen under the privileges granted for criticism and comment and from the legislative history. App. 9a-10a.

8. *See* footnote 3, *supra.*

Harper & Row, this Court has specifically discussed the issue of how the first of the four fair use factors should be analyzed and applied. There is nothing to be gained by revisiting the issue.[9] The Sixth Circuit's opinion makes clear that the presumption can be overcome within the framework established by the Congress, as analyzed in opinions of this Court.

The standards established by this Court on the fair use issue are clear. The various courts of appeal have applied those standards. *See, e.g., Rogers v. Koons* at 309. This issue is settled. Certiorari should be denied.

IV.

CONSIDERATION OF THE EFFECT ON THE POTENTIAL MARKET FOR OR VALUE OF A COPYRIGHTED WORK IS PROPER TO DETERMINE WHETHER A PARTICULAR USE OF A COPYRIGHTED WORK IS FAIR.

In criticizing the Sixth Circuit's market analysis of the fourth fair use factor, the effect of the use upon the potential market for or value of the copyrighted work, Petitioners focus almost exclusively on the unlikelihood that Petitioner's "Pretty Woman" would fulfill the demand for Acuff-Rose's "Oh, Pretty Woman." Simply put, Petitioners are asserting that because Acuff-Rose has not made or has not licensed a parody of "Oh, Pretty Woman" in

9. Petitioners' argument on this issue is rife with speculation and materials that are not in the record. For example, whether other groups creating "parodies" seek permission is not in the record, except for a reference to "Weird Al" Yankovic, made by Petitioners in their letter to Acuff-Rose. In point of fact, Mr. Yankovic does seek and receives permission to perform parodies of popular works. *See* footnote 2, *supra*. Petitioners imply that the nature of their work precluded the grant of permission. There is no evidence in the record on this point.

competition with Petitioners' "Pretty Woman," somehow Acuff-Rose's market has not been damaged. Petitioners further speculate that Acuff-Rose "had no reasonable expectation of developing a parody which criticized and mocked this time-honored rock-n-roll ballad." Petition at 21.

What Petitioners fail to acknowledge is that analysis under the fourth fair use factor is not limited solely to a "fulfills the demand" or substitution standard. Rather, the analysis includes a complete examination of the potential harm to the market for or value of the original copyrighted work, engendered by the claimed fair use. The Court of Appeals for the Sixth Circuit, citing this Court's decision in *Sony*, correctly observed:

> Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed.

App. at 16a, *citing Sony*, 464 U.S. at 451.

Petitioners' reliance upon the "fulfills the demand" or substitution standard is misplaced. In *Harper & Row* this Court held:

> More important, to negate fair use one need only show that if the challenged use "should become widespread, it would adversely affect the *potential* market for the copyrighted work."

Harper & Row, 471 U.S. at 569. The Court of Appeals for the Sixth Circuit properly applied the direction of this Court, stating that the "focus is on *potential* harm . . . ." App. at 16a.

Moreover, Petitioners attempt to bolster their position on the market effect by claiming that the Court of Appeals for the Sixth Circuit's decision is inconsistent with the analysis used in *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986). The *Fisher* court did limit its analysis to a "fulfills the demand" or substitution standard. However, in *Hustler Magazine Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986) which was decided approximately a month after *Fisher*, the Ninth Circuit returned to the full statement of effect on the potential market, including the market to license derivative works, such as parodies. *Hustler Magazine, Inc.*, 796 F.2d at 1155-56.

Additionally, this Court has warned on more than one occasion that the analysis under the fourth fair use factor "must take account not only of harm to the original but also of harm to the market for derivative works." *Harper & Row*, 471 U.S. at 566. The Court of Appeals for the Sixth Circuit properly applied this Court's mandate, stating that:

> [a]lthough we have already determined that harm for purposes of the fair use analysis has been established by the presumption attaching to commercial uses, we note that the inquiry under the fourth statutory factor not only considers harm to the market for the original but harm to the market for derivative works as well.

App. at 17a.

After citing an example from *Rogers v. Koons*, where the Court of Appeals for the Second Circuit examined the effect of a motion picture on the potential sale of adaptation rights for a book, the Sixth Circuit, in this case, dismissed as irrelevant the conclusion that "it is unlikely that 2 Live Crew's song could adversely affect the market for the original." The Sixth Circuit, after applying this Court's directives, properly concluded that "the record on this factor does not support a finding of fair use." App. 17a.

The various courts of appeal are in agreement and have followed Congress' statutory formulation of the fourth of the fair use factors. Contrary to Petitioners' position, this consideration is not limited to market substitution. No reason exists for this Court to reaffirm what Congress and the courts of appeal have clearly and consistently acknowledged. The Petition should be denied.

CONCLUSION

Wherefore, based on the foregoing, the Respondent, Acuff-Rose Music, Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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